

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

DAVID ANDREW SCHMIDT	§	
VS.	§	CIVIL ACTION NO. 1:17-CV-465
DIRECTOR, TDCJ-CID	§	

MEMORANDUM ORDER PARTIALLY ADOPTING
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner David Andrew Schmidt, a prisoner confined in the Texas Department of Criminal Justice, Correctional Institutions Division, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court ordered that this matter be referred to the Honorable Thad Heartfield, United States Magistrate Judge, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends granting the petition and restoring petitioner's good conduct time credits.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and the pleadings. Respondent filed objections to the magistrate judge's report and recommendation.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). Respondent contends that the petition should be dismissed as moot because petitioner's good conduct time credits were restored after the magistrate judge's report and recommendation was entered. After due consideration, the court is of the opinion

that the magistrate judge's report and recommendation should be adopted to the extent that it recommended dismissal, and the petition should be dismissed as moot.

In this case, the petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the petitioner need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84; *Avila v. Quarterman*, 560 F.3d 299, 304 (5th Cir. 2009). If the petition was denied on procedural grounds, the petitioner must show that jurists of reason would find it debatable: (1) whether the petition raises a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Elizalde*, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).

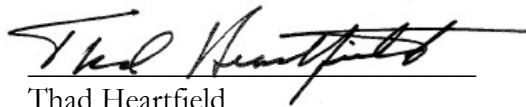
Here, the petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason, or that a procedural ruling was incorrect. In addition, the questions

presented are not worthy of encouragement to proceed further. Therefore, the petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability.

ORDER

Accordingly, the report and recommendation of the magistrate judge (document no. 10) is **PARTIALLY ADOPTED** to the extent that it recommends dismissal. A final judgment will be entered in this case in accordance with this memorandum order. A certificate of appealability will not be issued.

SIGNED this the 25 day of **June, 2018**.

A handwritten signature in black ink, appearing to read "Thad Heartfield", is written over a horizontal line.

Thad Heartfield
United States District Judge